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Pete N. Vlahos; Legal Forum Building; Attorney for Appellant.

Steven C. Vanderlinden; Attorney for Respondent.

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IN THE SUPREME COURT
OF THE STATE OF UTAH

WALTER JOHNSON,

Plaintiff and Respondent

vs.

Case No. 14647

RAMONA MERRITT JOHNSON,

Defendant and Appellant.

B R I E F O F R E S P O N D E N T

Appeal from Order of Second District Court
for Davis County
Honorable Calvin Gould, District Judge

STEVEN C. VANDERLINDEN
137 East State Street
Farmington, Utah 84025
Attorney for Respondent

PETE N. VLAHOS
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401
Attorney for Appellant

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IN THE SUPREME COURT
OF THE STATE OF UTAH

WALTER JOHNSON,

Plaintiff and Respondent,

vs.

RAMONA MERRITT JOHNSON,

Defendant and Appellant.

Case No. 14647

B R I E F O F R E S P O N D E N T

STATEMENT OF THE NATURE OF THE CASE

This is an action brought by the appellant against the respondent on an Order to Show Cause.

DISPOSITION IN LOWER COURT

The Honorable Calvin Gould, Judge, denied appellant's claim for relief and dismissed the Order to Show Cause.

RELIEF SOUGHT ON APPEAL

The respondent seeks to have the order denying the defendant's claim for relief on the Order to Show Cause affirmed.

STATEMENT OF FACTS

1. The plaintiff-husband and defendant-wife, were married in Missoula, Montana, on August 19, 1948.
2. On November 15, 1974, the plaintiff-husband filed a Complaint in the District Court, County of Davis, State of Utah, seeking a Decree of Divorce (R-1 through 3).
3. On December 16, 1974, an Amended Complaint was filed by the plaintiff-husband.

4. Pursuant to the Amended Complaint, the Second Judicial District Court, the Honorable Thornley K. Swan, Judge, issued an Order to Show Cause, returnable December 31, 1974.

5. The defendant filed an answer and counterclaim in the District Court of Davis County, State of Utah on December 30, 1974, wherein she listed her income, liabilities, and expenses (R-10 through 14).

6. At the request of counsel for the defendant, the Honorable Ronald O. Hyde, Judge, continued the Order to Show Cause to January 30, 1975 (R-15).

7. On February 3, 1975, the defendant filed an Order to Show Cause seeking temporary child support and temporary alimony until the divorce matter could be heard on its merits. The Order to Show Cause was signed by the Honorable Thornley K. Swan, Judge.

8. The Order to Show Cause which had been signed by the Honorable Thornley K. Swan, Judge, came before the Second Judicial District Court, the Honorable Ronald O. Hyde, Judge, presiding, on February 6, 1975. At that time, Judge Hyde ordered the defendant to tear up the Power of Attorney, which the wife had had for many years, and required the plaintiff to make the house payment and utilities on a temporary basis. Furthermore, Judge Hyde noted that the plaintiff had agreed to pay \$200.00 per month support plus the outstanding obligations of the parties herein.

9. The order on the Order to Show Cause, referred to above, was signed by the Honorable Ronald O. Hyde, on February 20, 1975.

to Compel Discovery in the District Court of the Second Judicial District (R-29).

11. The defendant's Motion to Compel Discovery came before the District Court, the Honorable John F. Wahlquist, Judge, presiding on April 1, 1975. The Court ordered copies of the document to be given defendant's attorney (R-31).

12. A pre-trial order was issued by the Honorable Thornley K. Swan, Judge, setting the case for a non-jury trial on the 16th day of May, 1975 (R-51).

13. A dispute arose between the parties pertaining to the temporary order issued by the Honorable Ronald O. Hyde on February 6, over the amount that the plaintiff was to pay towards the utilities used by the defendant (R-55).

14. On May 23, 1975, the Honorable Thornley K. Swan issued the Order to Show Cause in re contempt wherein the plaintiff was ordered to appear before the Second Judicial District, in and for Davis County, on the 3rd day of June, 1975.

15. On June 3, 1975, upon stipulation of counsel for the parties, the Order to Show Cause was continued by the Honorable Thornley K. Swan, Judge, to June 10, 1975.

16. On June 10, 1975, the matter came before the District Court of the Second Judicial District, County of Davis, for the hearing on the Order to Show Cause. The Honorable John F. Wahlquist, interpreting Judge Hyde's Order on the Order to Show Cause, ordered that the plaintiff was required to pay only \$35.00 per month on the utilities until further ordered

by the court (R-60).

17. On June 17, 1975, the defendant filed an affidavit seeking \$256.14 for alleged deficiencies in plaintiff's payments to her pursuant to the February 6, 1975, temporary order.

18. On June 18, 1975, the District Court of the Second Judicial District, the Honorable Calvin Gould, Judge, presiding, issued the Order to Show Cause to the plaintiff ordering him to show cause on the 27th day of June, 1975, at the commencement of trial, why he should not be required to pay to the defendant the sum of \$256.14.

19. Trial in the divorce proceeding was held on June 27, 1975, in the District Court of the Second Judicial District, the Honorable Ronald O. Hyde, Judge, presiding. In the affidavit of income, assets, and liabilities, dated June 27, 1975, the defendant included, for the first time, liabilities of \$275.00 to Dr. Steven Morgan, dentist; and \$250.00 to Franca Dunham. These liabilities had not been listed in the schedule filed December 30, 1974 (R-14).

20. A memorandum decision was issued by the Second Judicial District Court, County of Davis, the Honorable Ronald O. Hyde, Judge, presiding, on June 30, 1975. The Court granted the defendant a divorce on the grounds of mental cruelty on her counterclaim. The care, custody and control of the minor child was granted to the defendant subject to reasonable rights of visitation in plaintiff. The plaintiff was ordered to pay the sum of \$100.00 per month for the support of the minor child until he reached the age of majority. The plaintiff was further

ordered to pay the sum of \$200.00 per month alimony to the defendant. The defendant was awarded the house and real property in Layton, subject to the mortgage thereon, together with the household furniture and fixtures therein. The plaintiff was awarded the mobile home in Kaysville, subject to the mortgage thereon. The plaintiff was also awarded a Vista Liner Camper and pickup truck, a 1969 Ford Galaxie, which was inoperable, and a 1967 Mustang, which also was inoperable. The defendant was awarded a 1960 Opal. The contract interest which the parties had in property located in Kaysville was awarded to the defendant. The plaintiff was awarded the New York Life Insurance policy, his own county insurance and retirement, whatever savings he had in the Credit Union, his fishing gear, antique barbed wire collection, and his tools. The defendant was awarded stock which had a purchase value of \$100.00. The plaintiff was ordered to pay all of the outstanding obligations of the parties excepting the mortgage on the house awarded to the defendant. The utility bills that had been in dispute since the hearing on the Order to Show Cause were to be paid by the plaintiff. Judge Hyde also awarded \$400.00 in attorney's fees to the defendant and ordered defendant's attorney to draw Findings of Fact and Conclusions of Law and Decree in accordance with the memorandum.

21. On July 11, 1975, attorney for plaintiff wrote Judge Hyde pointing out that the award of the attorney's fees appeared to have been made in error since no testimony was presented

nor request was made for attorney's fees. Further, Mrs. Johnson had insurance to cover her attorney's fees and her attorney, Mr. Barnes, had, in fact, received \$325.00 from the insurance company for the initial filing of the action. Judge Hyde responded on July 17, 1975, amending the Decree to delete the award of the attorney's fees.

22. On January 27, 1976, the defendant filed an Affidavit for an Order to Show Cause in re contempt in which she alleged that the plaintiff had failed to pay certain outstanding debts. The Honorable John H. Wahlquist, Judge, ordered the plaintiff to appear before the District Court of Davis County on March 4, 1976, to show cause why he should not be judged guilty of contempt of court and punished accordingly for willfully disobeying the Order made on the 12th day of September, 1975.

23. The plaintiff filed an Affidavit in answer to the Order to Show Cause on February 24, 1976. In the Affidavit, the plaintiff swore upon his oath that he had paid the property tax on the family home for the year 1974; that he had paid the utility debts alleged to be unpaid in the Order to Show Cause; that he would, in fact, pay all outstanding obligations incurred prior to the filing of the Complaint in the divorce action; that he had, in good faith, paid all of the obligations and bills which had been incurred prior to the filing of the Complaint. Further, the plaintiff stated under oath that when he went to pick up the camper and truck, which had been granted him in

the Decree of Divorce, sugar had been dumped in the gas tank of the truck and the gas and water lines had been ripped from the camper. Further, the plaintiff asserted that the burden of alimony posed an undue hardship on him, that his wife was a fit and proper person to work, and that a limit on alimony should be imposed in this case so that he could get remarried and enjoy a fruitful life.

24. The defendant's Order to Show Cause came before the District Court of the Second Judicial District, in and for the County of Davis, State of Utah, on March 18, 1976. At that time, the Honorable Calvin Gould, Judge, was presiding. The defendant, plaintiff, Lynn Madsen, Clinton Hansen, and David Ray Johnson, were sworn and testified. The Court denied the request of the plaintiff for a reduction in alimony, and took the remaining matters under advisement.

25. On March 19, 1976, the Honorable Calvin Gould, Judge, issued a memorandum decision wherein he stated, referring to the defendant's claims of debt:

"I find the defendant's credibility to be seriously questioned and I elect not to believe her testimony. The other aspect of the case is that she further tests my credibility to ask me to believe that she has no knowledge nor hand in the events in the damage to the truck and camper.. The whole picture is one of post-divorce efforts to harrass the plaintiff-husband on every item that can be conceived by the defendant. The circumstances surrounding the truck and camper compel me to deny any relief to the defendant based on equitable clean hands doctrine. The Order to Show Cause is to be dismissed (R-95)."

26. From that ruling, the defendant appealed.

ARGUMENT

POINT I

JUDGE GOULD WAS NOT ACTING AS AN APPELLATE JUDGE WHEN HE PRESIDED AT THE HEARING ON DEFENDANT'S ORDER TO SHOW CAUSE AND DECLARATION IN RE CONTEMPT

The District Court has original jurisdiction in all matters civil and criminal, except those specifically excepted in the Utah Constitution or prohibited by law. The District Court, or any judges thereof, shall have power to issue the writs necessary to carry into effect their orders, judgments and decrees. Utah Constitution, Article VIII, Sec. 8, UCA 78-3-4. Proceedings in divorce are to be commenced and conducted in the manner provided by law for proceedings in civil cases. UCA 30-3-1. Pursuant to the above mentioned statutory provisions, a complaint seeking divorce was filed by the plaintiff on November 15, 1974, in the Second Judicial District Court, County of Davis, State of Utah. During the course of the proceedings, as set forth in the statement of facts, many of the justices of the Second Judicial District Court, were called upon to hear Orders to Show Cause and to make preliminary rulings. Justices Swan, Hyde, Wahlquist, and Gould participated in the proceedings prior to the divorce decree being issued. Despite the participation of the justices, however, the cause of action was always proceeding in the Second Judicial District Court. Rule 40 (a), Utah Rules of Civil Procedure, explains the procedure for placing cause of action upon the trial calendar. It states:

"The District Court shall provide by rule for the placing of the actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the Court may deem expediant. Precedents shall be given to actions entitled thereto by statute."

Rule 6, Court Rules of the Second District Court states:

"A. The court administrator shall make assignments of cases and motions and recommend judge assignments to provide, as far as practical, that: (1) responsibility shall be equally borne by all individual judges, reporters, and clerks; (2) all types of litigation shall be handled in substantially equal proportions by individual judges, reporters and clerks, except special probate clerks. (3) In the court administrator's discretion, the health and well being of the individual judge, reporter, and other court personnel is promoted; but all requests for special scheduling or changes in assignments for personal reasons, health, or otherwise, shall be made known to the judges at the next general meeting.

B. The court administrator may request the reassignment of a judge, reporter, or clerk at any time if the object of the change is to effect any of the above goals.

Pursuant to the above mentioned statutory provisions, the various motions of the divorce proceeding were placed upon the Law and Motion Calendar. The motions were then heard and determined by the justices presiding on that date. No objection was raised concerning the jurisdiction of the court nor was objections raised as to the power of the justices to hear the motion. The defendant, appellant herein, does not question the validity of the orders issued preliminarily, but seeks to attack the post judgment ruling by Judge Gould. The basic theory upon which such an attack is predicated appears to be that the Second Judicial District Court, Judge Gould presiding, by failing to find the plaintiff

in contempt was, in effect, not "enforcing" the Decree issued by the Second Judicial District, Judge Ronald O. Hyde, presiding. This position is clearly untenable.

Utah Code Annotated, Sec. 30-3-5 states:

"When a Decree of Divorce is made, the court may make such orders in relation to the children, property, and parties, and the maintenance of the parties and children as may be equitable. The Court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance or the distribution of the property as shall be reasonable and necessary. Visitation rights of parents, grandparents and other relatives shall take into consideration the welfare of the child."

The Court, not the individual judge presiding in a particular divorce case, has continuing jurisdiction to make subsequent changes or new orders with respect to the support and maintenance or the distribution of the property as shall be reasonable and necessary. Pursuant to the statutory provisions of U.C.A. 30-3-5, the defendant filed the order to show cause and declaration in re contempt. The cause of action was placed on the Law and Motion Calendar and assigned to the Honorable Calvin Gould, Judge. The Utah Supreme Court in In re Estate of Mecham, 537 P.2d 312 (Utah 1975), a case cited with approval by appellant, recognized that when a motion is placed on the Law and Motion Calendar, any judge of the court handling the calendar has jurisdiction to act upon the motion. In Mecham, the heirs of the estate filed a petition for an Order to Show Cause why the administrator should not file his accounting. After various hearing and proceedings, the administrator filed such an accounting and petition for distribution and discharge. It was noticed for hearing before

Judge Joseph G. Jeppson. Judge Jeppson ordered that the final account be denied but allowed the petitioner to amend. A month later the administrator filed a supplement to his accounting and mailed a copy to the counsel for the objecting heirs. Later, the administrator went to Judge Jeppson and obtained an ex parte order approving the account and granting the petition for a distribution and discharge. The objecting heirs filed a timely objection attacking the accounting and requested that the matter be set for trial. Subsequently, the administrator served and filed a motion to strike the objections and inserted a notice that the matter would be heard within the next few days. Counsel for the objecting heirs asserted that he was unaware of the hearing and consequently was not present at the hearing. He filed a motion to vacate the order. Although the motion would ordinarily have been presented to Judge Jeppson, Judge Jeppson told the counsel for the objecting heirs that the motion should be placed on the Law and Motion calendar. The Utah Supreme Court, reviewing the above mentioned situation, stated:

"Under such circumstances there is no question but that any other judge of the court handling the Law and Motion calendar, including Judge Taylor, would have had jurisdiction to act upon the motion, nor that any action taken thereon if deemed proper, would be subject to attack to have it corrected by a proper motion, and/or by an appeal. 537 P.2d 312-313.

The Utah Supreme Court went on to hold that Judge Stewart Hansen's ruling dismissing the order of Judge Taylor, because Judge Hansen believed that it purported to overrule the previous order of Judge Jeppson, was in error. The Court said:

"We have no doubt about the rule, applicable under proper circumstances, that a judge of one division of the same court cannot act as an appellate court and overrule another such judge, but that rule does not apply to the order of Judge Taylor in this case."

As delineated above, the objectors timely and properly invoked the jurisdiction of the court in filing their motion against the ex parte order of October 19, 1972, approving the accounting. While in normal procedure and protocol, this motion would have come up before Judge Jeppson, when he directed that it be placed on the general Law and Motion Calendar, any judge of the court had jurisdiction to act in the matter. When Judge Taylor did so, and his order was not changed or appealed from, it became the effective order in the case. 537 P.2d 312, 314.

In the case at bar, a similar fact situation is present. Judge Hyde issued the original divorce decree. When the defendant invoked the jurisdiction of the court in her Order to Show Cause and Declaration in re contempt, the motion was placed on the general Law and Motions Calendar. Pursuant to the language of the Mecham case, any judge of the court, including Judge Gould, handling the Law and Motion Calendar, would have had jurisdiction to act upon the motion. Exercising such jurisdiction was a proper exercise of the power and authority vested in Judge Gould by virtue of his position as a District Court Judge in the Second Judicial District Court.

As mentioned above, U.C.A. Sec. 30-3-5 provides:

"When a Decree of Divorce is made, the court may make such orders in relation to the children, property, and parties, and the maintenance of the parties and children as may be equitable. The court shall have continuing jurisdiction to make such

subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary. Parents, grandparents and other relations shall take into consideration the welfare of the child. (Emphasis added).

Although the court retains continuous jurisdiction over the matter, the action in re contempt is separate and apart from the principal action. Robinson v. City Court for City of Ogden, 112 Utah 36, 185 P.2d 256 (1949); Bott v. Bott, 20 U.2d 329, 437 P.2d 684 (1968). When an action in re contempt is instituted in civil contempt proceedings dealing with failure of a divorced spouse to honor the divorce decree, the jurisdiction of the original divorce action over the parties and issues is relied upon. However, the contempt action is placed on the general Law and Motion calendar. In Holbrook v. Holbrook, 117 Utah 114, 208 P.2d 1113, (1949) a divorce was granted to the wife on May 3, 1948, by the Second Judicial District Court, the Honorable Charles G. Cowley, presiding. In a subsequent contempt hearing the Honorable A. H. Ellett, temporarily sitting in the Second Judicial District, presided. Although Judge Cowley had issued the original divorce decree, the Utah Supreme Court upheld the contempt decree conviction issued by Judge Ellett.

The necessity of allowing a second judge to preside over contempt hearings is based upon strong public policy. Often times a contempt proceeding for alleged failure to abide by a divorce decree may be instituted several years after the original divorce decree. In Andersen v. Baker, 5 U.2d 33, 296

after the divorce, the husband was found in contempt of the 1949 divorce decree. In dicta, the Utah Supreme Court stated:

"The fact that the court below had jurisdiction over the parties and jurisdiction to interpret the stipulation and original decree must be recognized. Any error that may be present does not concern lack of jurisdiction. 296 P.2d 283, 285.

In Petersen v. Petersen, 530 P2d 821 (Utah, 1974), the parties obtained a Decree of Divorce in May, 1955. In August, 1965, an Order to Show Cause was issued against the wife alleging failure to comply with the visitation rights of the 1955 Decree. The Honorable Merrill C. Faux executed an order holding Mrs. Petersen in contempt and suspended the payment of support money until such time as Mrs. Petersen appeared before the Court in person and purged herself of contempt. Nine and a half years later, Mrs. Petersen moved for an Order to Show Cause why Mr. Petersen should not have to pay an amount equal to the suspended support payments. Third District Court Judge Peter Leary, held that Judge Faux's August, 1965 contempt order was vacated. The Utan Supreme Court, however, held that Judge Leary's ruling which vacated the 1965 contempt order was in error and sustained Faux's order. Again, this fact situation is very similar to the case at bar, although Judge Hyde presided at the divorce trial, Judge Gould presided at the contempt hearing. As in the case of Judge Faux, Judge Gould had the necessary statutory power and authority to preside at that hearing. When he made nis decision, that decision was not capable of review by another judge in the

District Court. Judge Gould was not reviewing nor modifying the Divorce Decree issued by Judge Hyde, but rather was presiding in an independent action to determine whether the plaintiff was to be found in contempt.

In the case at bar, Judge Gould was not acting as an appellate judge. The contempt proceedings was a separate action from the divorce action. Although the actions were related, having the same parties and concerning some of the same properties, the actions were independent. When the defendant filed the Order to Show Cause and declaration in re contempt, it was placed on the general Law and Motion Calendar. Judge Gould, assigned to sit at the Law and Motion hearings, properly heard the motion and evidence thereto. No objection was made by the defendant until after Judge Gould had ruled adversely to her. The grounds for which she argues for objecting to his presiding are clearly untenable. The Utah Supreme Court has long held that a contempt proceeding need not be presided over by the Judge who issued the original divorce decree.

POINT II

JUDGE GOULD PROPERLY RULED THAT THE PLAINTIFF WAS NOT IN CONTEMPT OF COURT BASED ON THE EQUITABLE CLEAN HANDS DOCTRINE.

Judge Gould, in the Order on the Order to Show Cause ruled that:

"It is hereby ordered, adjudged and decreed that the defendant's credibility is seriously questioned by the Court, and the Court did not elect to believe the defendant's testimony as to her knowledge of any alleged damage to the truck and trailer, and that the whole picture is one of post divorce efforts to harass the plaintiff husband on every item that can be conceived of by the defendant, and it is further ordered, adjudged and decreed that

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based on the equitable clean hands doctrine. The Order to Show Cause is hereby dismissed. (R-95, 96)

The "clean hands" doctrine has long been recognized in Utah law. In Baker v. Baker, 224 P.2d 192 (1950), the court discussed this doctrine. It said:

"It is a general rule that a party that is in contempt will not be heard by the court when he wishes to make a motion or grant a favor, and if a party files a pleading while in contempt, it will be stricken from the file on motion (citations omitted). In Cole v. Cole, 142 Ill. 19, 31 N.E. 109, 111, 19 L.R.A. 811, where a former husband was in arrears in his payments for alimony petitioned the court for modification of the decree in order to have the alimony payments reduced, the court denied his petition saying, "He is not coming to the court with clean hands and will not be permitted to ask relief from a decree from which he is in contempt. Before he should be permitted to be heard, he should be required to comply with the order of the court up to the time of his application." 224 P.2d 192, 194.

In Petersen v. Petersen supra, the Utah Supreme Court also discussed the "clean hands" doctrine. The Court said:

"There is no question that Mrs. Petersen was in contempt of court, after having been in such straits for 9 1/2 years when she applied for the support money judgment without having purged herself of the contempt. That requirement was a condition precedent to obtaining the support money, ie, the exercise of Mr. Petersen's right to see his children. Mrs. Petersen had not permitted this, which became the basis of her contempt. In short, she had not done and is not doing equity the while she insists on it, by now seeking, without any displayed penitence, remorse or strings attached, invoked the very jurisdiction of the court that she flouted before. She was in no conscionable position to do so, and the court need not have entertained her petition. To coin a paraphrased maxim of equity and reduce it to Pidgeon English, "One may not make a monkey out of the court", without cause, that is. 530 P.2d 821, 822.

In the case at bar, the plaintiff went to get the truck and camper which had been awarded him pursuant to the original divorce

decree. When he arrived, he found that sugar had been dumped in the gas tank, and that other damage had been done to the truck and camper. Judge Gould, after a review of the evidence, and testimony given by the parties and other persons concluded that he chose not to believe the defendant's testimony that she had no knowledge to the alleged damage to the truck and camper. Judge Gould found that "The whole picture is one of post divorce efforts to harass the plaintiff on every item that can be conceived of by the defendant." The defendant came into the court with "unclean hands". In such straits, she was not in a position to ask the court to do equity while she had not done equity. It was well within Judge Gould's discretion to refuse to require the plaintiff to pay the disputed debts.

CONCLUSION

The decree issued by the Honorable Ronald O. Hyde, Judge, granting a divorce to the defendant on her counterclaim, and awarding certain property to the parties, as well as care, custody, and control of the minor child, is to be given its full force and effect. When the Honorable Calvin Gould, Judge, presided in the Order to Show Cause and declaration in re contempt hearing, he was not acting as an appellate judge to review or modify the divorce issued by Judge Hyde. He was presiding over the motion which had been delegated to him by way of the general law and motion calendar. After a review of the evidence and testimony of the parties and others, he correctly held that the

plaintiff was not in contempt of the court and, because of the damage to the truck and camper, would not require the plaintiff to pay the disputed claims. These rulings were certainly within the power, authority and discretion of the Honorable Calvin Gould, Judge.

Respectfully submitted,

STEVEN C. VANDERLINDE
137 East State Street
Farmington, Utah 84025
Attorney for Respondent

CERTIFICATE OF MAILING

A copy of the foregoing Brief of Respondent was posted in the U. S. mail, postage prepaid, and addressed to the Attorney for the Appellant, Pete N. Vlahos, Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401, on this _____ day of October, 1976.
